Supreme Court, U.S.
FILED
JUN 19 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1873

In The
Supreme Court of the United States

October Term 1988

BOROUGH OF EAST CONEMAUGH, FRANCIS FEIST, LARRY GOSSARD, ROBERT FISHER, JR., JOSEPH RISHELL, JOHN ZALUSKI, JOHN STECIK and MICHAEL VARGO, individual council members or their elected replacements,

Petitioners,

v.

EASTERN TELECOM CORPORATION,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

JOHN J. MCLEAN, JR., ESQUIRE
(Counsel of Record)
MARK D. SHEPARD, ESQUIRE
BUCHANAN INGERSOLL
PROFESSIONAL CORPORATION
58th Floor, 600 Grant Street
Pittsburgh, PA 15219
(412) 562-8847

Attorneys for Respondent, Eastern Telecom Corporation

TABLE OF CONTENTS

Page

Table of Authorities ii

Opinions Below iii

Counterstatement of Questions Presented 1

Counterstatement of The Case 2

Reasons For Refusal of The Writ 4

A. The Circuit Court Reasonably Construed the Cable Act To Require Franchising Authorities, Such As The Borough, To Take Action Under The Cable Act in Accordance With The State Law Under Which They Are Created And Empowered To Act..... 5

B. The Issues Raised By The Borough In Its Petition Do Not Affect the Result of The Circuit Court's Decision..... 6

C. The Circuit Court Properly Considered The Legal Sufficiency of the District Court's Findings of Fact. 8

D. The Circuit Court Reasonably Construed The 120-day Appeal Period in Section 635 of The Act, 47 U.S.C. § 555, As Running From The Date of The Borough's Written Notice to Eastern Telecom of Its Denial of Eastern Telecom's Request For An Administrative Hearing. 9

TABLE OF AUTHORITIES

CASES

Page

Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1982) 7

Rollins Cablevue v. Saienni Enterprises, 633 F. Supp. 1315 (D. Del. 1987) 8

Singleton v. Wulff, 428 U.S. 106 (1976) 9

Tribune-United Cable of Montgomery County v. Montgomery County, Maryland, 784 F.2d 1227 (4th Cir. 1986) 7, 8

STATUTES AND RULES

47 U.S.C. § 521 1
47 U.S.C. § 546(a) 2
47 U.S.C. § 546(c) 3
47 U.S.C. § 546(d) 9
47 U.S.C. § 555 ..... 1, 3, 4, 9
53 Pa. C.S.A. § 45201 2
53 Pa. C.S.A. § 46116 5
Sup. Ct. R. 17 ..... 4, 7

OPINIONS BELOW

The opinion of the United States District Court for the Western District of Pennsylvania, which is not reported, is found in the Appendix filed by Petitioners at pp. A14-A41. The opinion of the United States Court of Appeals for the Third Circuit is reported at 872 F.2d 30 (1989).

COUNTERSTATEMENT OF QUESTIONS PRESENTED

I. Was the Circuit Court correct in construing the Cable Communications Policy Act of 1984, as amended, 47 U.S.C. § 521 *et seq.* (the "Cable Act") to require franchising authorities, such as the Petitioner to take actions in accordance with the state law under which they are created and empowered to act where the Cable Act is otherwise silent as to the method of action?

II. Where the Petitioner has not challenged the Circuit Court's holding that any notice establishing a deadline for submission of a franchise renewal proposal under the Cable Act must be in writing, should this Court grant the Petition challenging other aspects of the Circuit Court's opinion which do not affect the ultimate result?

III. Did the Circuit Court properly consider the issue of the legal sufficiency and relevance of the District Court's Findings of Fact?

IV. Was the Circuit Court correct in construing the 120-day appeal period in Section 635 of the Cable Act, 47 U.S.C. § 555, as running from the date of the Borough's written notice to Respondent, Eastern Telecom, of the Borough's denial of Eastern Telecom's request for an administrative hearing?

COUNTERSTATEMENT OF THE CASE

As Petitioner, Borough of East Conemaugh (the "Borough") concedes, and the Circuit Court determined, the Borough was incorporated and established pursuant to Pennsylvania statute, specifically 53 Pa. C.S.A. § 45201, and it derives its powers and authority to act from those statutes.

In November of 1985, the Borough authorized its Solicitor to commence proceedings under Section 626(a) of the Cable Act. 47 U.S.C. § 546(a). In accordance with that authorization, the Borough Solicitor scheduled and duly advertised a public hearing for December 10, 1985. After he had concluded the public hearing, the Borough Solicitor allegedly told representatives of Respondent, Eastern Telecom Corporation ("Eastern Telecom") that he wanted Eastern Telecom to submit its proposal for renewal of its cable television franchise to the Borough by no later than April 30, 1986. No such alleged deadline was ever communicated to any representative of Eastern Telecom in writing and there was no ordinance or resolution passed by the Borough to establish any such deadline or to authorize its Solicitor to establish such a deadline. Moreover, no such deadline appears in the record of the public hearing.

By letter dated June 14, 1986, Eastern Telecom submitted its proposal for renewal to the Borough for its consideration. In response to that proposal for renewal, the Borough Solicitor, by letter dated June 30, 1986, indicated that the Borough had decided not to renew Eastern Telecom's franchise. This was the first notice received by Eastern Telecom of the Borough's determination.

When the Borough failed to schedule an administrative hearing in accordance with Section 626(c) of the Cable

Act, 47 U.S.C. § 546(c), Eastern Telecom, through its legal counsel, wrote to the Borough Solicitor by letter dated November 3, 1986 requesting the Borough to schedule an administrative hearing. The Borough Solicitor, by letter dated November 19, 1986, replied that, after presenting Eastern Telecom's request to the Borough Council at its regular meeting, the Borough Council had resolved not to schedule the requested administrative hearing. (A 337).

Within 120 days of its receipt of this November 19, 1986 letter from the Borough Solicitor, Eastern Telecom filed an action in the United States District Court for the Western District of Pennsylvania pursuant to Section 635 of the Cable Act, 47 U.S.C. § 555, seeking to compel the Borough to schedule the required administrative hearing.

Although specifically finding that the Borough did not provide Eastern Telecom with written notice that its proposal for renewal was to be submitted to the Borough by April 30, 1986, the District Court denied Eastern Telecom's request for relief in the nature of mandamus on the grounds that Eastern Telecom's failure to meet the alleged oral deadline established by the Borough Solicitor allowed the Borough to make a final determination not to renew Eastern Telecom's franchise without making the required adverse findings as to at least one of the factors contained in Section 626(c)(1)(A)-(D) of the Cable Act pursuant to the record at an administrative hearing. 47 U.S.C. § 546(c)(1)(A)-(D).

The District Court's conclusion that Eastern Telecom had failed to comply with the 120-day appeal period set forth in Section 635 of the Cable Act, 47 U.S.C. § 555, also was based on Eastern Telecom's failure to comply with the

alleged oral deadline which, in the District Court's opinion, rendered the Borough's determination, as communicated to Eastern Telecom in the June 30, 1986 letter, a final determination under the Cable Act.

In reversing the District Court, the Court of Appeals for the Third Circuit determined that, as the Cable Act was silent as to the requirements for action by a franchising authority, the franchising authority must act in accordance with the state law under which it was created and empowered to act. The Circuit Court also held that, when acting to establish a deadline for the submission of a cable operator's proposal for renewal pursuant to the Cable Act, the franchising authority must communicate that deadline to the cable operator in writing.

Finally, because Eastern Telecom's action challenged the Borough's failure to comply with the renewal procedures under the Cable Act, the Circuit Court determined that the 120 day appeal period set forth in Section 635 of the Cable Act, 47 U.S.C. § 555, began to run from the date of the Borough's written notice to Eastern Telecom that it would not convene the requested administrative hearing. Thus, it held that Eastern Telecom's action was not time-barred.

REASONS FOR REFUSAL OF THE WRIT

In its Petition for Writ of Certiorari, the Borough has raised an array of supposed errors made by the Circuit Court in its Opinion reversing the District Court, none of which satisfies any of the standards relevant to a grant of Certiorari as set forth in Supreme Court Rule 17. Reduced to its essentials, the Borough's Petition is nothing more than a recitation of its disagreement with the Circuit Court's interpretation of a federal statute. Although the

Petition attempts to manufacture a conflict between the Circuit Court's decision and state law and a contrived conflict between the Circuits, even a cursory review of the cited statutes and decisions, makes it apparent that no such conflicts exist.

A. THE CIRCUIT COURT REASONABLY CONSTRUED THE ACT TO REQUIRE FRANCHISING AUTHORITIES, SUCH AS THE BOROUGH, TO TAKE ACTION UNDER THE CABLE ACT IN ACCORDANCE WITH THE STATE LAW UNDER WHICH THEY ARE CREATED AND EMPOWERED TO ACT

Although not challenging the Circuit Court's determination that state law establishes the legal requirements for action by a franchising authority under the Cable Act, the Borough, in Section I of its Petition, argues that the Circuit Court misconstrued the state statutes establishing the methods by which a Pennsylvania borough may act. First, contrary to the Borough's assertions, the Circuit Court held only that a franchising authority must comply with state law requirements in taking formal action under the Cable Act and that the record before the District Court contained no evidence that such requirements had been followed. That holding does not strip borough solicitors of any power or authority, as suggested by the Borough in its Petition, but merely requires that the borough council properly authorize the solicitor to act on its behalf.[1] The Borough's suggestion that 53 Pa. C.S.A. § 46116 provides

[1]Here, as the record reflects, the Borough Solicitor's alleged action in orally establishing a deadline took place after the public hearing and not in the presence of all council members as indicated by the Borough in its Petition. (A.162). Thus, there was no implicit ratification of the Solicitor's alleged action as the Borough suggests in its Petition.

carte blanche authority to a solicitor to exercise statutory power granted to a borough is a gross mischaracterization of the statute and, not surprisingly, is not supported by citation to any authority.

More importantly, since the Circuit Court remanded the case to the District Court for proceedings in accordance with its opinion, the Borough will have an opportunity to present any additional evidence it may have to support any assertion that it properly authorized its Solicitor, in accordance with state law, to act on behalf of the Borough in establishing a deadline for Eastern Telecom's submission of a proposal for renewal.

B. THE ISSUES RAISED BY THE BOROUGH IN ITS PETITION DO NOT AFFECT THE RESULT OF THE CIRCUIT COURT'S DECISION

The Borough has not challenged the Circuit Court's holding that any deadline established by a franchising authority for submission of a proposal for renewal of a cable franchise must be communicated to the cable operator in writing. Additionally, the record is clear and the District Court specifically found that the Borough did not provide any written notice to Eastern Telecom. Thus, although Eastern Telecom believes that each of the issues raised by the Petitioner is without merit, a reversal of the Circuit Court's opinion on any of those issues will not change the result as the Borough still will not have validly established a deadline under the Cable Act, regardless of whether or not it acted in accordance with state law.

Moreover, even if, upon remand, Eastern Telecom obtains the relief sought in the District Court, there is no guarantee that its cable franchise will be renewed by the Borough following the administrative hearing or that the

record at the administrative hearing will support reversal of a Borough decision not to renew the franchise.

Specifically, the Borough's objections to the Circuit Court's interpretation of Sections 626(h) and 626(c)(i) of the Cable Act, 47 U.S.C. §§ 546(c)(i) and (h), as contained in Sections III and IV of the Petition, simply ask this Court to clarify portions of the Circuit Court's Opinion. This Court, however, reviews judgments, not opinions. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1982). Thus, this Court should not review those questions raised by the Borough which will not affect the ultimate result or judgment.

Clearly, by properly establishing and communicating to a cable operator a deadline for submission of a franchise renewal proposal, the franchising authority controls the timing of the franchise renewal process so as to provide the orderly process which the Borough complains the Circuit Court has upset. In fact, the Circuit Court's decision adds more certainty to the process as opposed to maintaining the uncertainties and informalities which resulted in this dispute and protracted litigation.

Finally, the alleged conflict between the Circuit Court's decision and the decision in *Tribune-United Cable of Montgomery County v. Montgomery County, Maryland*, 784 F.2d 1227 (4th Cir. 1986), is a strained effort on the Borough's part to satisfy at least one of the standards set forth in Sup. Ct. R. 17. Contrary to the Borough's assertion, however, no such conflict exists. First, the two decisions deal with completely different sections of the Cable Act. Second, the *Tribune-United* court, which decided in favor of the cable operator, also recognized the concern in Congress for the plight of cable operators which led to the inclusion in the Cable Act of a franchisee's right to seek

modification of an existing franchise agreement. 784 F.2d at 1231. Lastly, the Circuit Court in this case and the *Tribune-United* Court merely quoted and paraphrased the applicable portions of legislative history which discussed the specific section of the Cable Act under consideration in each case. In fact, the Circuit Court's recitation of the purpose of the franchise renewal provisions of the Cable Act is consistent with the only other reported decision discussing this section of the Act. *See Rollins Cablevue v. Saienni Enterprises,* 633 F. Supp. 1315 (D. Del. 1986).

C. THE CIRCUIT COURT PROPERLY CONSIDERED THE LEGAL SUFFICIENCY OF THE DISTRICT COURT'S FINDINGS OF FACT

In Section V of its Petition, the Borough raises a question concerning the Circuit Court's review of the District Court's findings of fact. What the Borough fails to recognize, however, is that the Circuit Court did not reverse the District Court's findings concerning the establishment of a deadline for submission of a franchise renewal proposal but merely determined that the findings were legally insufficient and irrelevant. Although the issue of the legal requirements for action by a franchising authority under the Cable Act had not been addressed directly below, Eastern Telecom, in its appeal, did challenge the District Court's conclusion that the Borough had complied with the Cable Act in denying Eastern Telecom's proposal for renewal of its franchise as well as the legal sufficiency of the Borough's alleged oral deadline.

Moreover, the Borough has not challenged the Circuit Court's authority to raise and decide this issue. Nevertheless, even if the Borough's Petition is viewed as raising

such a challenge, the Circuit Court clearly had the authority to consider the issue of the legal requisites for action by a franchising authority under the Cable Act even if the parties had not addressed previously that specific issue. *See Singleton v. Wulff,* 428 U.S. 106, 121 (1976).

D. THE CIRCUIT COURT REASONABLY CONSTRUED THE 120-DAY APPEAL PERIOD IN SECTION 635 OF THE ACT, 47 U.S.C. § 555, AS RUNNING FROM THE DATE OF THE BOROUGH'S WRITTEN NOTICE TO EASTERN TELECOM OF ITS DENIAL OF EASTERN TELECOM'S REQUEST FOR AN ADMINISTRATIVE HEARING

In Section VI of its Petition, the Borough simply asserts that the Circuit Court's interpretation of Section 635 of the Cable Act, 47 U.S.C. § 555, is incorrect. Again, the Circuit Court adopted a reasonable interpretation of the Cable Act in situations where a cable operator is challenging the franchising authority's failure to comply with the procedures of the Act as opposed to a final determination made on the basis of the record created at an administrative hearing.[2]

The Circuit Court's interpretation is consistent with the language of the Cable Act which requires a franchising authority to commence an administrative proceeding on its own initiative or at the request of the operator. 47

[2]Because the Act requires that a franchising authority's final determination not to renew an existing operator's cable franchise be based on one or more adverse findings made with respect to the four factors described in section 626(c)(i)(A)-(D) pursuant to the record of the administrative proceeding, 47 U.S.C. § 546(d), there cannot be an appeal from a final determination without completion of the administrative proceeding.

U.S.C. § 546(c)(i). As that language suggests and the Circuit Court held, where the franchising authority fails to commence the administrative proceeding, the cable operator, if it desires such a proceeding, must request it and if that request is denied, the required failure of the franchising authority to comply with the procedures under the Cable Act has occurred.

Once again, contrary to the Borough's assertion that the Circuit Court has upset the orderly renewal process under the Cable Act, the franchising authority has the power to control the process and avoid delay by simply commencing the administrative proceeding as required under the Cable Act as opposed to waiting for the cable operator's request for such a proceeding.

CONCLUSION

For the foregoing reasons, it is submitted that the Petition for Writ of Certiorari should be denied.

Respectfully Submitted,

BUCHANAN INGERSOLL
PROFESSIONAL CORPORATION

By: .....

JOHN J. MCLEAN, JR., Esquire
MARK D. SHEPARD, Esquire
58th Floor, 600 Grant Street
Pittsburgh, PA 15219
(412) 562-8847

Attorneys for Respondent,
Eastern Telecom Corporation